85-382

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

DAVID HEGGY,

Petitioner,

vs.

CARL WELTY and SUSAN WELTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

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QUESTION PRESENTED

Whether petitioner's due process rights were violated because the state courts permitted entry of a default judgment based upon deficient notice, not reasonably calculated to apprise petitioner of the pendency of the action, denying petitioner the opportunity to be heard in his defense.

PARTIES

All parties to the proceeding petitioned from appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI
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David Heggy, your petitioner, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals for the State of Wisconsin entered April 18, 1985, review having been denied by the Supreme Court of the State of Wisconsin on July 11, 1985.

OPINIONS BELOW

The opinions of the Wisconsin Court of Appeals and the Wisconsin Circuit Court are reproduced in the Appendix hereto (beginning at A-1 and A-33, respectively. The Court of Appeals' decision has been recommended for publication and is scheduled to be reported in Vol. 123 of the Wisconsin Reports. The trial court decision is unreported. The Order of the Wisconsin Supreme Court denying review is reproduced in the Appendix at A-31.

JURISDICTION

The judgment of the Wisconsin Court of Appeals was entered on April 18, 1985. This judgment held that the trial court judgment of December 10, 1983, awarding plaintiff below $156,163.16 in

compensatory damages and $200,000.00 in punitive damages, and the trial court's order of April 6, 1984, denying petitioner's motion to set aside such judgment, were not void for want of personal jurisdiction.

Petitioner timely filed a petition for review in the Wisconsin Supreme Court. The court denied this petition on June 11, 1985.

This petition is being filed within ninety days of the denial of the petition for review by the Wisconsin Supreme Court. The jurisdiction of this Court is invoked under 28 USC §1257(3), because the petitioner claimed Constitutional due process rights which claim was denied by the Wisconsin courts. This federal question was raised as discussed at page 14, infra.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fourteenth Amendment, §1 --

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 801.11, Wis. Stats.

> 801.11. Personal jurisdiction, manner of serving summons for
>
> A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> (1) Natural person. Except as provided in sub. (2) upon a natural person:
>
> (a) By personally serving the summons

upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode within this state in the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof.

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the sumons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

STATEMENT OF THE CASE

This case draws into question the Constitutional adequacy of the service by publication in this case. Carl and Susan Welty filed a Summons and Complaint in Wisconsin Circuit Court on July 13, 1983, alleging that petitioner caused them property damage and severe emotional distress, and claiming $250,000.00 in compensatory damages and $250,000.00 in punitive damages. They made several attempts to serve defendant at his home at a time when he was away from home on an extended vacation (Transcript January 23, 1984, pp. 16-17, 35-39). They made no attempt to ascertain his whereabouts. Failing to effect personal service, they sought to accomplish service by publication and mailed notice under sec.

801.11, Stats. Four mailings were made, three of which were to variations of petitioner's home address, at a time when plaintiffs knew that petitioner did not receive mail at his nome (Transcript, January 23, 1984, p. 13; February 1, 1984, pp. 12,15; Plaintiff's Exhibit 84, p. 6). No mailing was made to petitioner's post office address. All of these mailings were returned to sender by the post office. Petitioner's post office address had not changed for over two years and easily could have been discovered by inquiry at town offices or by inquiring of other persons known by the Weltys to have this information (Transcript, January 23, 1984, pp. 13, 71; February 1, 1984, p. 26). The Weltys in fact had actual knowledge of this post office address prior to the default trial date. Instead of acting on this knowledge and attempting

to notice petitioner, the Weltys intentionally kept the trial date secret to avoid appearance by petitioner (Transcript, January 23, 1984, pp. 11-12; February 1, 1984, pp. 109-110, 113-114, 111-124).

Default judgment was rendered on December 10, 1983 and entered on December 12, 1983, in the amount of $356,000.00. On January 14, 1984, petitioner moved the court to set aside the judgment.

Petitioner filed notice of appeal from the default judgment on January 24, 1984. On April 6, 1984, the trial court denied petitioner's motion to set aside the judgment. Petitioner promptly filed notice of appeal from this order, and the two appeals were consolidated for hearing before the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed the trial court's denial of the

motion to set aside the judgment and affirmed the trial court's award of compensatory damages in the amount of $156,000.00. The Wisconsin Court of Appeals reversed the punitive damages award and remanded for a new trial on that issue.

Petitioner timely filed for review by the Wisconsin Supreme Court. Such review was denied by order of the court entered June 11, 1985. This petition followed that denial.

RAISING THE FEDERAL QUESTION BELOW

On his appeal from the default judgment, petitioner had no opportunity to raise any issues at the trial court level. In his motion to set aside the verdict, petitioner strenuously asserted the lack of personal jurisdiction, arguing that plaintiffs had not exercised due diligence to obtain personal service or service by mailing before resorting to service by publication. Plaintiffs' brief to the trial court discussed principles of constitutional due process at some length (see A-95). In addition, the trial court expressly considered due process requirements at the hearing on the motion to vacate the judgment (Transcript, February 1, 1984, pp. 185-197, A-90). Thus, the constitutional issues clearly were raised below and decided by the trial court. On direct appeal to the Wisconsin

Court of Appeals from the default judgment, the petitioner clearly and plainly raised the Constitutional issue (Brief and Appendix of Defendant-Appellant). Because he therefore had not waived this right, the issue was properly before the Court of Appeals.

The Court of Appeals' stated refusal to address petitioner's Constitutional claim below for failure to raise the issue in the trial court cannot deprive this Court of the right to review herein. First, the trial court and the Court of Appeals both actually decided the Constitutional issue. Secondly, the state procedural rule used to evade review of the Constitutional issue is not a rule strictly or regularly followed. Barr v. City of Columbia, 84 S.Ct. 1734, 1736, 378 U.S. 146, 12 L.Ed.2d 766 (1964).

The Court of Appeals conceded that it has the discretion to address the Constitutional issue where the issue has had full factual development, where both parties have had opportunity to brief the issue, and where it is in the interest of justice to do so (Opinion, p. 10, A-17). The appeals court could not deny that there was full factual development and that the issue was briefed by both parties. The court based its exercise of discretion solely on the following ground (Opinion, p. 10, A-18):

> Defendant's constitutional attack is essentially an attack on plaintiffs' reasonable diligence which we have already resolved in plaintiffs' favor insofar as sec. 801.11(1), Stats., requires it.
>
> Defendant was found to have actual notice of the action and to have purposely avoided service.

The court gives no other reasons for its refusal to address the Constitutional

issues. It is plain that these reasons constitute the court's opinion , on the merits of the case, that due process was satisfied. The Court of Appeals thus, in fact, decided the Constitutional issue now before this Court, and therefore this Court has jurisdiction. Orr v. Orr, 99 S.Ct. 1102, 1110, 44 U.S. 268, 276-277, 59 L.Ed.2d 306 (1979).

In other decisions by the Wisconsin courts, Constitutional issues raised for the first time on appeal have been considered routinely whenever there is full factual development and both parties have briefed the issue. In Stierle v. Rohmeyer, 218 Wis. 149, 260 N.W. 647, 654 (1935), the Wisconsin Supreme Court held that a due process claim not raised at trial should be considered on appeal:

It is also argued that as the

> unconstitutionality of the provisions was not raised in the court below, it will not be considered here. This is a general rule, but it is sometimes "more honored in the breach than in the observance." [Citations omitted.] When the point is one of law, not at all dependent on facts that might have been presented below had the point been there raised, no compelling reason is perceived why it may not be considered on review, and no reason is perceived why the constitutionality of the provision here involved should not be now considered and decided. The point has been fully and very ably briefed by counsel on both sides by direction of the court, and nothing more could possibly have been presented below than has been presented here.

As these cases demonstrate, review by the Wisconsin appellate courts is almost automatic whenever, as here, there is full factual development and both parties have briefed the issues. Accord, State v. Popanz, 112 Wis.2d 166, 332 N.W.2d 750, 753 n. 1 (1983); In the Interest of Baby Girl K, 113 Wis.2d 429, 335 N.W.2d 846 (1983), app. dismissed, Buhoe v. Krueger, 104 S.Ct. 1262; Binder v. City of Madison,

72 Wis.2d 613, 241 N.W.2d 613, 617 (1976). Cases denying review generally have involved lack of sufficient factual development. State v. Yellow Freight System, Inc., 101 Wis.2d 142, 303 N.W.2d 834, 842 (1981); Laufenberg v. Cosmetology Examining Board, 87 Wis.2d 175, 274 N.W.2d 618, 624 (1979).

Additionally, it should be noted that the Wisconsin procedural rule rests on a presumption of waiver which cannot apply to this case. The analysis of the above cases cannot even be reached in the absence of such waiver. In State v. Wiedner, 47 Wis.2d 321, 325-326, 177 N.W.2d 69 (1970), the court held:

> With respect to a claim of constitutional right (as opposed to questioning the constitutionality of a statute) this court has stated that failure to raise such an issue in the trial court may result in the question being deemed waived....

The Wiedner court, despite finding such waiver, went on to decide the constitutional issue because there were no factual issues in need of resolution.

This case involves two appeals consolidated before the Court of Appeals. The first of those appeals was a direct appeal from the default judgment. As to that appeal, the petitioner made no appearance in the trial court. Because he thus had no opportunity at all to present any arguments, Constitutional or otherwise, he hardly can be deemed to have waived any arguments. Regardless of the subsequent order denying petitioner's motion to set aside the judgment, the petitioner had a right to raise any issues regarding personal jurisdiction which directly challenge the judgment on appeal. Heaston v. Auston, 47 Wis.2d 67, 176 N.W.2d 309 (1978). He cannot be

foreclosed from raising Constitutional arguments on this direct challenge, because he never waived the right to raise those arguments. Kohler Co. v. I.H.L.R., 81 11, 25, 9 N.W.2d 695 (1977).

Because Wisconsin has no procedural rule of strict application justifying its refusal to specifically address petitioner's Constitutional claims, this Court has the right to review those claims. Barr v. City of Columbia, 84 S.Ct. 1734, 1736, 378 U.S. 146, 12 L.Ed.2d 766 (1964). Furthermore, the matter is fully developed for this Court. The factual matters underlying the claim are fully set out in the record. Both parties briefed the Constitutional issues below and will do so again on this review. The Wisconsin Court of Appeals in fact decided the merits of the

Constitutional issue. There can be no doubt that the issue is properly before this Court.

REASONS FOR GRANTING THE WRIT

I. This case presents a substantial issue of federal law.

Petitioner is subject to a $156,000.00 default judgment entered without notice or opportunity to be heard. This is a substantial deprivation of his rights under the United States Constitution. This Court always has considered the entry of judgment without personal jurisdiction to be a serious and substantial violation of the due process clause of the Fourteenth Amendment. In Kulko v. Superior Court, 98 S.Ct. 1690, 1696, 436 U.S. 86, 91, ____ L.Ed.2d ____ (1978), this Court stated:

> It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. Pennoyer v. Neff, 95 U.S. 714, 732-733, 24 L.Ed. 565, 572 (1878); International Shoe Co. v. Washington, 326 U.S., at 316, 66 S.Ct., at 158. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-314, 70 S.Ct. 652-657, 94 L.Ed. 865 (1950)....

The record below clearly indicates that the notices were mailed to addresses which plaintiffs knew were not petitioner's post office address. Plaintiffs had actual knowledge of petitioner's post office address prior to the default hearing and thereafter failed to call this to the court's attention and failed to attempt to direct any notice to that address, expressly attempting to keep the date of the hearing secret so that petitioner would not find out about the

hearing and appear. Under Wisconsin law, if they had revealed this information to the trial, the court would have an obligation to inquire further. Hansher v. Kaishian, 79 Wis.2d 374, 255 N.W.2d 564 (1977).

The notice in question was not reasonably calculated to give petitioner notice of the hearing, but instead was expressly calculated to avoid such notice. There can be no question that this is a denial of due process. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to defend [citation omitted]***

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

The attempts at mailed notice in this case were mere gestures, not sincere attempts to accomplish service. This Court in Mullane held that due process required the trustee to mail notice to the post office addresses of all beneficiaries whose whereabouts could be ascertained with due diligence. 70 S.Ct. at 659, 339 US at 317. In the case of a trust with a large number of beneficiaries, the court found that "notice reasonably certain to reach most of those interested is likely to safeguard the interests of all." 70 S.Ct. at 659, 339 U.S. at 319. Where, as here, the plaintiffs had only one party to notify, due diligence clearly requires reasonable inquiry to discover

petitioner's post office address. Certainly due diligence requires more than disregard of actual knowledge of that address.

Petitioner's post office address could have been obtained easily if plaintiffs had been seriously desirous of delivering notice to petitioner. They made no attempt to contact various persons, such as petitioner's caretaker or attorney, either to determine his whereabouts or post office address. They failed to check town records. They did not contact a bank which was the trustee of a trust fund established for petitioner, and plaintiffs' attorney admittedly decided not to contact the bank officers because he did not want to make them aware of the lawsuit (Transcript, December 9, 1983, p. 67). Their attorney advised plaintiffs not to discuss the case

because they were afraid petitioner would learn about it (Transcript, February 1, 1984, p. 113). They made three useless mailings to the residence despite their knowledge that mail was not received at the residence. Plaintiffs' attempts at notice were knowingly calculated not to inform petitioner of the proceeding and thus fail to satisfy due process.

II. The court below decided a novel federal question in a way which conflicts with Supreme Court precedent.

In determining that plaintiffs had exercised reasonable diligence in attempting personal service and service by mail, both the trial court and the Wisconsin Court of Appeals relied upon after-the-fact evidence tending to show that petitioner actually would not have received the summons even if plaintiffs had pursued sources of information available to them. Thus, these courts took the position that steps otherwise necessary to satisfy the reasonable diligence test required by principles of due process may be excused by subsequent proof that such steps would have been unsuccessful anyway. In short, the courts below concluded that reasonable diligence

need not be utilized if plaintiffs subsequently can prove that such diligence would have been unsuccessful. Such an interpretation of the requirements of due process is novel and never has been suggested by the decisions of this Court.

This Court consistently has held that compliance with the notice and hearing requirements of due process is a precondition to a valid proceeding adversely affecting the liberty or property rights of a party. E.g., Mennonite Board of Missions v. Adams, 103 S.Ct. 2706, 2709-2712 (1983). Service by publication may be utilized only after reasonable diligence is exercised to attempt a superior form of service, and only after those attempts have proved unsuccessful. Actual knowledge is not a substitute for the failure to comply with due process notice requirements. Given

these well settled principles, the state courts' position is untenable.

Before relying on publication to supply personal jurisdiction, due process requires that a plaintiff employ means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Hanover Trust Co., 339 U.S. 306, 315 (1950). This rule necessarily requires that the determination of whether such steps have been taken be based upon the state of facts known to the plaintiffs when they attempted service. It is the conduct of the plaintiffs and the extent of the steps taken at that time which control. Due process cannot be satisfied by an after-the-fact determination that the notice required by due diligence might not have reached the defendant. The ruling below is, therefore, in conflict

with Supreme Court precedent requiring the exercise of reasonable diligence.

III. <u>This case involves important questions of law which should be settled by this Court.</u>

The general standard applicable to the due process issue is well settled. That is, a plaintiff must use reasonable diligence in attempting to serve a defendant with notice of a lawsuit before resorting to constructive notice. However, the paucity of case law defining in more practical detail what constitutes reasonable diligence requires further clarification from this Court. For example, the present case poses the question of the extent to which a plaintiff must attempt to ascertain a defendant's whereabouts when he cannot be

located at his home. Plaintiffs contended that their attempts to serve defendant at his home were sufficient; they made no attempts to inquire of available sources as to petitioner's actual whereabouts. The case also poses the question of the extent to which local offices and other sources must be checked to determine a post office address. Petitioner's post office address could have been obtained from local utility companies, local tax records, and from his driver's license and automobile registrations, as well as from petitioner's attorney, caretaker, and insurance agent. Plaintiffs made no attempt to check such sources.

There is very little reported case law elaborating upon the standard of reasonable diligence set forth by this Court. Future plaintiffs attempting service of process and courts deciding

whether to permit service by publication would be aided greatly by a decision of this Court elaborating upon the general standard. The requirements of due process in this context are of great importance in the administration of justice, and the issue arises with frequency. The present case illustrates the manner in which the general standard can be misinterpreted. This Court should take the opportunity to elaborate upon the applicable principles.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of Wisconsin in Welty v. Heggy. In the event that the Petition is granted, Petitioner prays that the judgment of the court below be reversed and that the cause be remanded to the Circuit Court for trial.

Respectfully submitted,

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APPENDIX

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No. 84-198

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

CARL WELTY and SUSAN WELTY,

Plaintiffs-Respondents

v.

DAVID HEGGY,

Defendant-APPELLANT.

APPEAL from a judgment and order of the circuit court for Rock County: J. RICHARD LONG, Judge. Affirmed in part, reversed in part and remanded.

Before Gartzke, P.J., Dykman, J. and Bruce F. Beilfuss, Reserve Judge.

BEILFUSS, Reserve Judge. This is a consolidated appeal from a default judgment and an order denying defendant's motion to set aside that judgment. The judgment granted compensatory and punitive damages for defendant's intentional

infliction of emotional distress and property damage.

The defendant contends on appeal that personal jurisdiction was not obtained over him because plaintiffs failed to exercise reasonable diligence in their service of process and in their attempts to obtain his post-office address for the mailing component of service by publication. The defendant further contends that the trial court abused its discretion by not setting aside the judgment pursuant to defendant's motion. We hold that the trial court acquired personal jurisdiction over the defendant and that the court did not abuse its discretion by denying relief from the judgment. We remand, however, for retrial on punitive damages because that controversy was not fully tried. Sec. 752.35, Stats.

This action was initiated in July of 1983 after a history of acrimonious and abusive conduct by the defendant toward the plaintiffs. The plaintiffs made repeated unsuccessful attempts to serve summonses on the defendant at his home. Inquiries were made to determine where the defendant might be served, with no results. The defendant testified he was outside Wisconsin from mid--July 1983 to January 1984, although several witnesses saw the defendant at his home at various times during this time period. The trial court found that defendant was seen at his residence during this time period, that he had intentionally evaded service of the summons and complaint, and that he had actual notice of this action.

The plaintiffs effected service by publication and mailing. Copies of the summons and complaint were mailed to the

only four addresses of defendant known to the plaintiffs; they were all "return[ed] to sender" by the postal department.

The trial court held a default hearing, and judgment was entered for plaintiffs totaling $356,163.16 plus costs of $315.74 on December 12, 1983. Punitive damages constituted $200,000 of the total judgment. The defendant moved to set aside the judgment, pursuant to sec. 806.07(1), Stats., on January 14, 1984. This motion was denied, the court concluding that the defendant failed to show excusable neglect or reasonable prudence, that the punitive damages were not excessive, and that opening the judgment would be an injustice to the plaintiffs.

Personal Jurisdiction

The defendant contends that plaintiffs did not invoke the court's personal jurisdiction because of improper service of process under sec. 801.11, Stats. That section's prescriptions must be followed. Actual notice alone is insufficient:

> [A]ctual notice alone does not settle the question. This court has held that when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where the defendant has actual notice of the summons and complaint. 512 Corp. v. Department of Transportation, 92 Wis.2d 276, 287, 284 N.W.2d 643 (1979); Danielson v. Brody Seating Co, 71 Wis.2d 424, 429 , 238 N.W.2d 531 (1976). The question is, were the [statutory] provisions... complied with.

Horrigan v. State Farm Ins. Co., 106 Wis.2d 675, 681, 317 N.W.2d 474, 477 (1982). Section 801.11 provides in relevant part:

A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

(1) NATURAL PERSON. Except as provided in sub. (2) upon a natural person:

(a) BY personally serving the summons upon the defendant either within or without this state....

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

The plain meaning of sec. 801.11(1) requires service under subsection (1)(a) to be attempted with reasonable diligence before an alternative method of service is employed. The defendant concedes "that plaintiffs exercised reasonable diligence

to personally service defendant within the State of Wisconsin"[1] but contends that service "without this state" (sec. 801.11(1)(a)) was not attempted with reasonable diligence.

The supreme court has treated "reasonable diligence" as a finding of fact to be affirmed unless against the great weight and clear preponderance of the evidence. See West v. West, 82 Wis.2d 158, 165, 262 N.W.2d 87, 90 (1978); Span v. Span, 51 Wis.2d 786, 790, 191 N.W.2d 209, 212 (1971).[2] This test is essentially the same as the clearly erroneous standard of sec. 805.17(2), Stats., which we now apply to findings made by the court. Noll v. Dimiceli's, Inc., 114 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct.App. 1983). The basic facts regarding plaintiffs' diligence are undisputed, however, and the determination

of appropriate service of process is therefore a question of law.

Although case law defining reasonable diligence is sparse, sec. 801.11, Stats., does require pursuit of "leads or information reasonably calculated to make personal service possible." West, 82 Wis.2d at 166, 262 N.W.2d at 90. Rock County deputy sheriffs made repeated attempts to personally service the defendant at his Denture Lane home in the Town of Turtle from July through December 1983.[3] Several of the process servers knew the defendant, and knew him to reside at the Denture Lane home. Inquiries regarding defendant's whereabouts were made of other deputies and Town of Turtle officers, but no other addresses were known. One of the deputies attempting service has previously inquired of the town clerk where the

defendant might be found, and as a result was led to inquire at "Varney Printers" on Cross Street in Beloit, but was unable to serve the defendant. No one at Varney Printers had heard of the defendant.

The repeated attempts to serve the defendant at the Denture Lane home were reasonable in light of Mr. Welty's testimony that he observed things at the defendant's residence which led him to infer that the defendant was there at the time service was attempted. The plaintiffs saw cars parked in the driveway, clothes hung on the line, and lights on in the house. When such sightings occurred, plaintiffs phoned their attorney to suggest attempts at service. The defendant's presence was corroborated by other witnesses. Neighbors and Town of Turtle road workers personally observed the defendant at his

Denture Lane home during the time service was attempted. The trial court found the defendant was seen at his residence during this period, and that the defendant intentionally evaded service. These findings of fact are not clearly erroneous.

Because the defendant was at his residence and repeated attempts at service were made, attempts to locate and serve the defendant outside the state might have been unnecessarily duplicative. But attempts to locate the defendant, through inquiries, were made to determine whether he was within or without the state. All information obtained indicated he would be found at Denture Lane. West suggests that under these circumstances, immediate family members should be contacted, 82 Wis.2d at 166-67, 262 N.W.2d at 90, but the record reveals nothing with regard to the existence of such family members.

Although the plaintiffs did not contact the defendant's resident caretaker, he testified he did not know the defendant's whereabouts during the latter half of 1983. The defendant testified that no one knew his address while he was gone from the Beloit area.

Because of the plaintiffs' repeated attempts to serve the defendant while he was in the Beloit area, their efforts to discover his whereabouts and the lack of leads or information as to his whereabouts while outside the state, we conclude the plaintiffs exercised reasonable diligence to serve the defendant under sec. 801.11(1)(a), Stats.

The plaintiffs effected service by publication after failing to serve the defendant personally. The defendant contends that plaintiffs failed to serve him by publication properly because

reasonable diligence was not exercised to obtain his post-office address. Section 801.11(1)(c), Stats., provides:

> If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.
>
> [Emphasis added.]

The plaintiffs mailed a copy of the summons and complaint at the time of first publication to the four addresses of the defendant known to the plaintiffs. The plaintiffs' attempts to personally serve the defendant had not revealed any other addresses.

The defendant previously received mail at at least one of the addresses used

by the plaintiffs, a post-office box, but had several months before cancelled it after a squabble with the post office. He did not file a forwarding address in part to avoid "junk mail." He also refused to provide a mail receptacle at his home on Denture Lane.

During the time of the mailing, the defendant did receive mail at Varney Printers in Beloit at 613 Cross Street. Inquiries at this location by plaintiffs' process server attempting service in a previous action had resulted in no information regarding the defendant. Only a few people were informed of this address, including the defendant's caretaker, insurance agent, and his attorney from previous actions.

It is not clear from the record whether the plaintiffs knew the identity of these people, or whether the plaintiffs

were able to contact them. Under these circumstances, "reasonable diligence" did not require that they be pursued for defendant's post-office address.

The defendant contends that the plaintiffs' attorney knew that defendant was the principal beneficiary of his father's estate and that a certain Beloit bank was trustee of a trust created by defendant's father, and also that the plaintiffs' attorney knew the father's personal representative at that bank, and yet the plaintiffs' attorney purposely avoided contacting the bank. Accepting this as true, we hold that under these circumstances reasonable diligence does not require the pursuit of such a remote source for either the post-office address or location of the defendant. The bank, in any event, knew only of the Denture Lane address for the defendant and not of

the alleged 613 Cross Street address.

The defendant also notes that plaintiffs received a package from defendant on November 26, 1983 bearing a 613 Cross Street return address. The package arrived three months after publication and mailing and was therefore of no assistance to plaintiffs. In addition, the plaintiffs believed the "gift" to be a hoax. Mr. Welty referred to the package as "booby-trapped," and therefore something the defendant would not put his true address on. Under these circumstances no mailing to 613 Cross Street was required. While the plaintiffs' efforts to discover defendant's post-office address might have been more strenuous, we decline to hold them not reasonably diligent.

The attempts at service and mailing were generally hampered by the

defendant's process dodging. The trial court found the defendant to have "intentionally evaded the service of the summons and the complaint in this action." This finding is supported by ample testimony. The plaintiffs mailed copies of the summons and complaint to the addresses known for the defendant, made inquiry as to other addresses, and could have found the 613 Cross Street address only through the exercise of extraordinary diligence. We therefore hold under these circumstances that plaintiffs complied with sec. 801.11(1)(c), Stats.

The defendant contends here for the first time that plaintiffs' attempts at service fell short of due process standards because "plaintiffs did not truly desire to give actual notice of the suit to defendant." Constitutional issues raised for the first time on appeal are

generally not considered by this court. In Boeck v. State Highway Comm., 36 Wis.2d 440, 447-48, 153 N.W.2d 610, 614 (1967) the supreme court stated:

> Plaintiffs on this appeal have for the first time attacked the constitutional adequacy of notice by mail under the circumstances of this case. This court has consistently taken the position that it will not ordinarily consider constitutional issues presented for the first time on appeal.

Constitutional issues raised initially on appeal may be addressed when in the interests of justice or when there are compelling reasons to do so, provided both parties have briefed the issue which has had full factual development below. See In Interest of Baby Girl K., 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983), appeal dismissed, ____ U.S. ____, 79 L.Ed.2d 670 (1984); Sambs v. Brookfield, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975)

Neither compelling reasons nor the interest of justice require us to address defendant's constitutional claim, and we therefore decline to address it. Defendant's constitutional argument is essentially an attack on plaintiffs' reasonable diligence which we already resolved in plaintiffs' favor insofar as sec. 801.11(1), Stats., requires it. The defendant was found to have actual notice of the action to have purposely avoided service. Testimony in the record supports these findings, which are not clearly erroneous. Under these circumstances we decline to address the defendant's constitutional argument.

Motion to Set Aside Judgment

The defendant moved for relief from the default judgment under sec. 806.07(1)(h), Stats., which provides relief for "[a]ny other reasons" than

those enumerated in sec. 806.07(1)(a)-(g). The defendant contends he was entitled to relief because default judgments are disfavored, evidence was improperly admitted, the evidence was insufficient, the damages were excessive, he acted promptly for relief stating a meritorious defense, and because he lacked actual notice of the plaintiffs' claim.

The trial court stated in the hearing on defendant's motion that relief under sec. 806.07(1)(h), Stats., should not be granted where the movant failed to show either a reasonable degree of prudence or excusable neglect, citing Hansher v. Kaishian, 79 Wis.2d 374, 391, 255 N.W.2d 564, 573 (1977). The trial court found that defendant refused to accept mail at his residence, evaded service of the summons and complaint, and had actual notice of the pending action.

The court concluded that the defendant was "neglectful, careless and inattentive in this matter" and that he failed to demonstrate he had "exercised a reasonable degree of prudence." The court denied the motion.

Hansher required excusable neglect or reasonable prudence because the statutory grounds for relief alleged in Hansher required such a showing. Hansher did not address the "[a]ny other reasons" standard for relief relied on by the defendant. Hansher construed a predecessor to sec. 806.07(1)(a), Stats., which authorized relief from a judgment for "mistake, inadvertence, surprise or excusable neglect." See sec. 269.46(1), Stats. (1973). A different subsection of sec. 269.46 (1973), subsection (3), which was not construed in Hansher, contained a

counterpart to the sec. 806.07(1)(h) catch-all provision on which defendant premised his motion. Another subsection of sec. 806.07(1) states excusable neglect as a ground for relief but subsection (h) simply requires any other reasons which justify relief.

Section 806.07(1)(h), Stats., and sec. 269.46(3), Stats. (1973), were analogized in In Matter of Estate of Smith, 82 Wis.2d 667, 672-73, 264 N.W.2d 239, 242 (1978). The court concluded the catch-all provision conferred a broader discretionary power than that under the excusable neglect ground, Id.,[4] and affirmed a decision to grant relief from a judgment. The decision to grant relief was premised on the trial court's determination that it had "failed to give sufficient consideration to several matters of evidence.... In effect, the

judge stated that his original findings and conclusions were based upon insufficient consideration of the evidence and of the law." Id. at 674, 264 N.W.2d at 242-43. Excusable neglect was not an issue, thus implicitly suggesting a distinction between the subsection (h) "other reasons" and the subsection (a) "excusable neglect."

Federal decisions construing the analogous federal rule 60(b)(6)[5] hold the catch-all provision to be exclusive of other enumerated grounds in the rule.[6] The Wisconsin Supreme Court recently stated that subsection (a) and (h) are mutually exclusive, State ex rel. J.L.B. v. D.G.H., ____ Wis.2d ____, ____, 363 N.W.2d 419, 423 (1985), but noted that:

> Since almost every conceivable ground for relief may arguably come within subsections (a) through (g), a strict mutual exclusivity approach might render subsection (h) superfluous. Subsection

> (h) should be applied when the petition alleging factors arguably within (a), (b), or (c) also alleges extraordinary circumstances that constitute equitable reasons for relief.... finality is important.... Subsection (h) should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by "the incessant command of the court's conscience that justice be done in light of all the facts." Bankers Mtg. Co. v. United States, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970) (emphasis in original).

Id. at ____, 363 N.W.2d at 425-6.

The defendant's excusable neglect or reasonable prudence may be relevant to a motion under sec. 806.07(1)(h), Stats., insofar as they help establish or are accompanied by extraordinary circumstances justifying relief. The trial court's emphasis on defendant's lack of excusable neglect and reasonable prudence was therefore not misplaced despite the exclusivity of sec. 806.07(1)(h). The "[a]ny other reasons" ground for relief cannot operate to relieve a party from the

consequences of its purposeful avoidance of a lawsuit. The supreme court noted in M.L.B., ____ Wis.2d at ____ n.9, 363 N.W.2d at 428, the "preference for an adversarial determination of the merits" in federal case law, but acknowledged that this preference is often negated by a petitioner's conscious choice to permit the action to proceed to judgment. "Relief is frequently denied when the petitioner had earlier made a fair and deliberate choice at the time judgment was rendered." Id. The seventh circuit's decision in C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1206 (7th Cir. 1984) is persuasive:

> [R]ule 60(b) is applied liberally in the default judgment context only in the exceptional circumstance where the events contributing to the default judgment have not been within the meaningful control of the defaulting party, or its attorney. Although a default judgment is a harsh sanction and the law does favor trials on the merits,

> these considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants.

The circumstances leading to the default judgment were "within the meaningful control of the defaulting party" who chose to permit the default. Further, the defendant's contentions for relief present not exceptional circumstances, but instead simply disputes with the trial court's fact finding.

The standard governing the discretionary authority to grant relief under sec. 806.07, Stats., has been analogized to an "interest of justice" standard. See Conrad v. Conrad, 92 Wis.2d 407, 418, 284 N.W.2d 674, 679 (1979). The statute "must be liberally construed to allow relief... 'whenever such action is appropriate to accomplish justice.'" Id. (quoting Klapprott v.

United States, 335 U.S. 601, 615 (Black, J., concurring), modified, 336 U.S. 942 (1949)).

Opening the entire judgment would not serve the ends of justice. The court found that defendant purposely avoided service, and had actual notice of the action. The court also stated as a finding of fact from the default hearing the following:

> I will say for the record that in the view of this court I have practiced law for thirty-one years and now I have been a judge for four years, I have not seen any conduct in the opinion of the court more extreme and more outrageous directed to peace-loving, fine people in a manner specifically calculated not only to destroy the property rights of the plaintiffs but to destroy the very lives and existence of the plaintiffs.

We conclude the trial court did not abuse its discretion by denying defendant's sec. 806.07(1)(h), Stats., motion. However, the punitive damages award must be

reconsidered because the record does not reveal with reasonable certainty the extent of the defendant's assets.

The trial court considered the defendant's assets in assessing punitive damages, including assets presumptively devolving to the defendant from his father's estate and trust. The trial court ordered assets transferred from the father's trust to satisfy the judgment against the defendant, but neither the plaintiffs nor the court knew the identity of the trust's beneficiary or beneficiaries.

The plaintiffs correctly contend that the defendant's wealth is only one factor for consideration in assessing punitive damages. But where the defendant's assets are considered, reliance upon them must be rational and premised on fact. We remand for retrial

solely on punitive damages because the record reflects uncertainty on the assets available to the defendant and the real controversy has, therefore, not been fully tried. Sec. 752.35, Stat.; See Hanz Trucking, Inc., v. Harris Brothers Co., 29 Wis.2d 254, 269, 138 N.W.2d 238, 246 (1965) (damages ordered retried because issue not fully tried).

By the Court.--Judgment and order affirmed in part and reversed in part and claim remanded.

Inclusion in the official reports is recommended.

APPENDIX

[1] The defendant does not argue that the plaintiffs lacked reasonable diligence in serving him under sec. 801.11(1)(b), Stats.

[2] While the defendant's motion to set aside the judgment was explicitly made pursuant to sec. 806.07, Stats., which generally involves the exercise of trial court discretion, West states that vacation of a judgment allegedly void for lack of personal jurisdiction involves determinations of fact:

> While under sec. 269.46(1), Stats. [now sec. 806.07(1)(a)], we review the exercise of the trial judge's discretion, where a claim is made that a judgment is void the question is simply whether the finding of fact made with respect to the validity or invalidity of the judgment is contrary to the great weight and clear preponderance of the evidence.

West, 82 Wis.2d at 166, 262 N.W.2d at 90. West's conclusion is based in part on the lack of "void judgment" as a specified ground for relief under the statute governing relief from judgments. Subsequent to West, void judgment was added to sec. 806.07 as a basis for relief. The inclusion of void judgment in sec. 806.07 does not affect our standard of review in this case because even were the issue to be one of discretion, such discretion would have to be exercised

consistent with sec. 801.11, Stats., and the facts underlying the interpretation of that statute. The question remains, ultimately, one of fact as to attempts at service, and law as to their legal significance.

[3] The trial court found that several Rock County deputies made nineteen attempts to serve the defendant.

[4] See also Stradinger v. City of Whitewater, 89 Wis.2d 19, 28 n. 4, 277 N.W.2d 827, 830 (1979).

[5] Federal Rule 60(b) and sec. 806.07, Stats. are substantial equivalents. Ennis v. Ennis, 88 Wis.2d 82, 91, 276 N.W.2d 341, 344 (Ct.App. 1979).

[6] Klapprott v. United States, 335 U.S. 601, 614-15 (Black, J., concurring) ("In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power... to vacate judgments"), modified, 336 U.S. 942 (1949); De Filippis v. United States, 567 F.2d 341, 343 (7th Cir. 1977) ("Rule 60(b)(6)... is separate from and exclusive of the other five grounds specified in Rule 60(b)"); Byron v. Bleakley Transportation Co., 43 F.R.D. 413, 415 (S.D.N.Y. 1967) ("the category created by Rule 60(b)(6) is exclusive of the more particularized reasons for setting aside a default outlined in the Rule.")

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, June 11, 1985

TO: Margaret Kemp-Williams
Edward E. Grutzner
Grutzner, Byron, Holland
& Vollmer
312 W. Grand Avenue
Beloit, WI 53511

Frank X. Kinast
Christopher G. Kinast
263 W. Grand Avenue
Beloit, WI 53511

Hon. J. Richard Long
Rock County Circuit Court
250 Garden Lane
Beloit, WI 53511

The Court today announced an order in your case as follows:

No. 84-198 Carl Welty and Susan Welty v. David Heggy

The court having considered defendant-appellant-petitioner David Heggy's petition for review of an adverse decision of the court of appeals, district IV, dated April 18, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiffs-respondents.

MARILYN L. GRAVES
Clerk of Supreme Court

SC-105

STATE OF WISCONSIN, CIRCUIT COURT, BR. 5, ROCK COUNTY

Carl Welty and
Susan Welty,
Plaintiffs,

JUDGMENT
Case No.
83 CV 938

v.

David Heggy,

Defendant.

The proofs of service show service upon the defendant, David Heggy, by publication and mailing.

The plaintiffs have filed their affidavit of no answer that the defendant is in default.

The court has taken testimony of the plaintiffs by default on December 7 and December 9, 1983. Plaintiffs have filed their brief of the law. Exhibits were received in and counsel for the plaintiffs have argued their case to the court. The court has filed its findings of fact and conclusions of law in which it is directed that judgment be entered accordingly.

Upon motion of Grutzner, Byron, Holland & Vollmer, S.C., attorneys for plaintiffs,

It is adjudged that the plaintiffs, Carl Welty and Susan Welty recover of the defendant, David Heggy, the following:

Damages to real estate

and personal property	$11,163.16
Personal injuries: Carl Welty	75,000.00
Susan Welty	70,000.00
Punitive Damages: Carl Welty	100,000.00
Susan Welty	100,000.00
Total Judgment	$356,163.16

Three hundred fifty six thousand, one hundred sixty three dollars and sixteen cents, plus costs in the amount of Three Hundred Fifteen and 74/100 Dollars, in all Three Hundred Fifty-six Thousand, Four Hundred Seventy-eight and 90/100 Dollars ($356,478.90).

The plaintiffs reside at Route One, Highway X, Beloit, Wisconsin 53511. The occupation of Carl Welty is that of professor biology retired, and author. The occupation of Susan Welty is that of author.

David Heggy resides at Route One, Highway X, Beloit, Wisconsin 53511. His present occupation is not known but he has for many years been employed by Eastern Airlines as a pilot.

It is adjudged pursuant to sec.

813.026, Stats., that Heritage Bank Beloit, personal representative of the Estate of Glen F. Heggy, deceased, and trustee of the revocable intervivos trust created by Glen F. Heggy, January 3, 1967, transfer sufficient of the Estate of Glen F. Heggy, deceased and of the trust of Glen F. Heggy and of the property held jointly by Glen F. Heggy and David Heggy, to satisfy this judgment in full.

Edward Grutzner, Attorney for the plaintiffs, Carl Welty and Susan Welty, shall give notice of the judgment forthwith to the Heritage Bank Beloit, personal representative of the Estate of Glen F. Heggy, deceased, and trustee of the revocable intervivos trust created by Glen F. Heggy, January 3, 1977.

The funds ordered transferred by the Heritage Bank Beloit include the property of the Estate of Glen F. Heggy, deceased, which is subject to administration, all assets held by the Heritage Bank Beloit as joint property of the defendant and his deceased father, and all asets [sic] held by the Heritage Bank Beloit in a revocable lifetime trust created by the deceased, Glen F. Heggy, January 3, 1967 and subsequently amended on several occasions regarding which the Heritage Bank Beloit acted as trustee on the date of death, and regarding which it is still acting as trustee.

Dated: December 10, 1983

BY THE COURT:

(Signed)
J. Richard Long, Circuit Judge, Rock County

STATE OF WISCONSIN, CIRCUIT COURT, BR. 5, ROCK COUNTY

Carl Welty and
Susan Welty,
Plaintiffs,

v.

David Heggy,

Defendant.

FINDINGS OF FACT CONCLUSIONS OF LAW

Case No. 83 CV 938

This case came on for hearing before me the Honorable J. Richard Long, on December 7, and December 9, 1983. I find that this court has jurisdiction over the defendant, David Heggy.

I have received the trial brief of Attorneys Grutzner, Byron, Hollard & Vollmer. I have taken testimony and received in evidence various documents and other exhibits. Upon motion of Grutzner, Byron, Holland & Vollmer, S.C., I make the following:

FINDINGS OF FACT

1. Plaintiffs are husband and wife and reside at Route 1, County Trunk X, Beloit, Wisconsin. Carl Welty is presently 82 years of age and Susan Welty is presently 78 years of age. That the plaintiff, Carl Welty, is a retired college professor. He is an ornithologist and an author and that Susan Welty was previously a college professor, a teacher, and she is an author.

2. Defendant resides at Route 1, Denture Lane, Beloit, Wisconsin. His current occupation is unknown but he has been for many years and may now still be a pilot for Eastern Airlines.

3. The defendant's residence property is adjacent to and contiguous to the plaintiffs' residence property and bird sanctuary.

4. Since July 14, 1980, and during such times as the defendant has physically resided in the home of his parents adjacent to the Welty's property, harassment of the Weltys has continued by the defendant, David Heggy, without any provocation by the Weltys.

5. David Heggy has intentionally caused severe emotional distress and resultant bodily harm to the Weltys by extreme and outrageous conduct.

6. I find that the defendant, David Heggy, has during the times relevant to this action acted intentionally to cause very severe emotional injury and distress to the Weltys, as follows:

7. He has fired a gun during the day and during the nighttime on many occasions.

8. He has frequently set off firecrackers.

9. He has made frequent phone calls to the Weltys at all hours of the night and early morning. Then, when the phone was picked up, he would not speak but would

sometimes play a tape recorder or if the phone was not answered by the Weltys he would simply let the phone ring. On one occasion the phone rang as long as one hour in the early morning. On other occasions obscenities were spoken into the phone.

10. The defendant has intentionally and purposely pointed and aimed what appeared to Mr. Welty to be a gun, at him while Mr. Welty was working on his own property.

11. The defendant has shot at and shot a bullet through the Weltys' bedroom window while they were sleeping in their bedroom near the window.

12. On at least two different occasions the defendant has pointed at Mr. Welty what appeared to be a broom handle and has shouted at him the word "bang" or "bang bang."

13. Through the spraying or herbicide the defendant has intentionally and purposely destroyed many trees belonging to the Weltys, many shrubs belonging to the Weltys, grasses upon the Welty property, flowers of the Weltys, and vegetables of the Weltys, until he has essentially desolated a part of the Welty property physically.

14. The defendant has on several occasions destroyed the Welty mailbox.

15. The defendant has hung a toilet seat from a tree in a location so as to display the toilet seat prominently toward the Welty property close to the

Welty property. David Heggy has displayed several obscene signs near to the fence facing the Welty property, one sign appearing to be perhaps two feet by three feet in size displaying an obscenity toward the Weltys and this was just not displayed once but it was, and these signs were, displayed over periods of time.

16. The defendant, David Heggy, has intentionally and purposely played excessively loud music which could be heard from the Welty property so loud as to disturb the reasonable tranquility of the Weltys.

17. The defendant has intentionally used some type of instrument to deliver a high pitched sound easily audible from the Welty property and so loud as to destroy the desireable living qualities of the Welty property.

18. The defendant Heggy has yelled at both Mr. and Mrs. Welty. He has also yelled at guests of the Weltys.

19. He has also stood on his own property and near his fence but silently stared at Mr. Welty in a manner to cause any ordinarily reasonable person to be fearful.

20. The defendant has purposely caused over 1,400 pieces of mail of various types and subscriptions to be delivered to them requiring them to cancel orders for subscriptions, to write letters telling people that property or items had not been ordered trying to explain to people that this was not mail that

should be coming to them.

21. I also find that the defendant purposely placed a strobe light which was operated in the night toward the Welty property disturbing their peace and tranquility.

22. I also find that the defendant placed nails in the driveway of the Weltys and on another occasion placed nails in the Weltys' driveway that were particularly designed and sharpened to destroy the tires of any car that would be using the Welty driveway.

23. The defendant fabricated and placed sharp knife-like objects under the tires of Mr. Welty's car in order to attempt to blow out all four tires of the car.

24. The defendant designed and purposely placed iron reinforcing rods into the ground leaving them sticking up about a foot out of the ground and driving them into the ground about a foot in order to attempt to damage Mr. Welty's mower and, in fact, it did damage the sickle bar on the mower.

25. I also find that the defendant has caused to be delivered to the Weltys a Christmas card that it does not appear to the court was sent with sincerity and was disturbing to the Weltys.

26. The defendant most recently sent to the Weltys a Christmas gift that caused the Weltys to be fearful of the contents of the package and made them afraid to open the package because they were not sure of the contents which they believed

might have been explosives.

27. I find that the defendant purposely sprayed Mr. Welty with a garden hose when Mr. Welty was on his own property and had caused no provocation of any kind ever to the defendant.

28. The defendant mowed or caused to have his lawn mowed at the late hours of the night and the early hours of the morning purposely to destroy the peace and tranquility and disturb the sleep of the Weltys and their guests.

29. The defendant purposely set fire to a portion of the Welty property known as the pine plantation or the pine woods.

30. The plaintiffs have shown that the defendant's conduct was intentional. The defendant behaved as he did for the purpose of causing emotional distress to each of these plaintiffs. I not only find that this conduct was intentional but I find that it was carefully planned. That it was carefully executed and it was specifically done in order to cause severe emotional distress to each of the plaintiffs. I find that the defendant's conduct was not only intentional but that it was extreme and outrageous.

31. I will say for the record that in the view of this court I have practiced law for thirty-one years and now I have been a judge for four years, I have not seen any conduct in the opinion of the court more extreme and more outrageous directed to peace-loving, fine people in a manner specifically calculated not only to

destroy the property rights of the plaintiffs but to destroy the very lives and existence of the plaintiffs.

32. The plaintiffs' testimony and the exhibits show that the defendant's conduct was in fact a cause of substantial emotional and psychological injury to each of the plaintiffs and that as a result of these injuries each of the plaintiffs have suffered extreme disabling emotional responses and injuries resulting from the defendant's conduct. For this finding I refer specifically to the report of Dr. Leigh Roberts regarding the examination Dr. Roberts conducted upon these plaintiffs.

33. At the time in life when because of their age these individuals should be enjoying the sweetest years of their existence the intentional conduct of the defendant has caused each of them to be very apprehensive, to live in constant fear, and on occasion to live in fear of death.

34. Mr. Welty's concentration for his work has been damaged. He finds that at times his mind wanders because of the unpleasant incidents involved. Both of the Weltys worry constantly about what will happen next.

35. The Weltys mourn the loss of what they describe as their pleasant green valley and their garden of Eden.

36. Mr. Welty at the time when what he perceived to be a gun was pointed at him and trained on him, wondered what it would feel like to be shot with pellets. He

perceived the gun to be a shotgun rather than a rifle.

37. This conduct on the part of the defendant has caused the Weltys to experience outrage which peace-loving people of this kind should be free from. The plaintiffs are not the kind of people that would become outraged except for extreme provocation.

38. When Mr. Welty goes outside he wears a blaze orange hat so that his neighbor David Heggy can't claim he shot Carl Welty because he mistook him for an animal.

39. These plaintiffs are preoccupied with thoughts of what next will happen to their home.

40. The plaintiffs have documented carefully the incidents and I find that each of the documented incidents did in fact occur. There is a chronology of events in evidence and I find that those events occurred as itemized therein. These events were intentional acts of the defendant Heggy designed and created specifically to cause extreme emotional harm to these plaintiffs.

41. Both of the plaintiffs are emotionally strong persons but they have been subjected to extreme emotional stress. Their sleep has been interfered with on many occasions.

42. The psychological injury which has occurred to each of them is a permanent disabling psychological injury. It is something that they cannot and will not

get over as long as they live.

43. The acts of the defendant has caused the plaintiffs to fear leaving their home for short trips. When they have had to be away from their home they have had to leave people behind to guard their property. They were required to give up a long trip to the northwest and southwest because of the intentional acts of the defendant.

44. The plaintiffs have been humiliated in front of their friends by the acts of the defendant.

45. I find that all of the injuries to Carl Welty and all of the injuries to Susan Welty were caused by the intentional acts of the defendant David Heggy and that those acts were done by design. They were intentional. They were extreme. They were outrageous. They were in fact the cause of the injuries to the plaintiffs and the plaintiffs' emotional response and injury is extremely disabling.

46. I find the evidence in this case to be clear, satisfactory and convincing. I am convinced to a reasonable certainty of the facts as I have found them.

47. I will award for the damages to the gardens the sum of $1,819.54. For damages to trees $8,000.00 For damages to the pine plantation $1,250.00. For damages to the sickle bar $93.62, in all Eleven Thousand, One Hundred Sixty-three and 16/100 Dollars ($11,163.16).

48. With respect to compensatory damages for the injury to Carl Welty I

will award the sum of Seventy-five Thousand Dollars ($75,000.00).

49. To Susan Welty, who has not had to take the steps to try to undo the mail situation I award for compensatory damages for injury to her person the sum of Seventy Thousand Dollars ($70,000.00).

50. For punitive damages in favor of Carl Welty and against the defendant, David Heggy, I will award the sum of One Hundred Thousand Dollars ($100,000.00).

51. To Susan Welty for punitive damages against David Heggy, I will award the sum of One Hundred Thousand Dollars ($100,000.00).

52. I will also award to the plaintiffs their taxable costs and disbursements of this action.

And I make the following:

CONCLUSIONS OF LAW

1. Plaintiffs are entitled to judgment against defendant, David Heggy accordingly.

2. The plaintiffs satisfied the Court by affidavit that the defendant, David Heggy, is interested, as heir in the estate of his father, Glen F. Heggy, deceased, and that the property of David Heggy, liable to execution is probably insufficient to satisfy this judgment.

3. Plaintiffs are entitled to judgment pursuant to sec. 813.026 Stats., adjudging

the transfer of sufficient of the interest of David Heggy in the estate of his father, Glen F. Heggy, deceased, to satisfy this judgment.

4. Edward Grutzner, Attorney for the plaintiffs, Carl Welty and Susan Welty, shall give notice of the judgment forthwith to the Personal Representative of the Estate of Glen F. Heggy, deceased, Heritage Bank, Beloit.

5. The funds ordered transferred by the Heritage Bank Beloit include the property of the estate of Glen F. Heggy, deceased, which is subject to administration, all assets held by the bank as joint property of the defendant and his deceased father, and all assets held by the Heritage Bank Beloit in a revocable lifetime trust created by the deceased, Glen F. Heggy, January 3, 1967 and subsequently amended on several occasions regarding which the Heritage Bank Beloit acted as trustee on the date of death, and regarding which it is still acting as trustee.

Let judgment be entered accordingly.

Dated: December 10, 1983.

BY THE COURT:

(Signed)
J. Richard Long, Circuit Judge

MR. FRANK KINAST: I should say this, and just, I'm sorry, Mr. Grutzner, and the Court, you know, actually when you -- when you look at this case in the total picture, you got an intelligent person, no question about it, Finding of Fact Number 3 by the Court. David Heggy is a very intelligent person. That was the Finding of Fact in the initial case. Now, you've got a very intelligent person who a year ago, as I said earlier, hired a lawyer for a minor case. It would be absurd, or it would be preposterous to think here is a man who is sued for a half million dollars, he's aware of it, and he doesn't even hire a lawyer. And so as I say, in the total picture, it would be absurd to conclude that this defendant was aware of this lawsuit until December of 1983.

THE COURT: Thank you.

MR. GRUTZNER: Would the Court tape --

I've turned this on so I don't have to order a transcript.

THE COURT: This case is before the Court on the 6th day of April, 1984, for decision on the motion of the defendant, David Heggy. And that motion is dated January 14th, 1984. And that motion is to set aside the judgment entered in this action and all subsequent proceedings thereon, and to let the defendant defend the same and file and serve his answer on such terms as may be just, all pursuant to Section 806.07(1) of the Wisconsin Statutes. And as has been made clear to the Court by the attorney for Mr. Heggy, the motion is based particularly and singularly upon Section 806.07(1)(h) of the Wisconsin Statutes.

The plaintiffs, Carl Welty and Susan Welty, have appeared by their attorneys, Edward Grutzner and Margaret

Kemp-Williams, of Grutzner, Byron, Holland and Vollmer, a Service Corporation.

And the defendant has appeared in person and by his attorneys, Frank X. Kinast and Christopher Kinast.

On this motion testimony was taken on January 23rd and February 14th, 1984. And counsel have served and filed their briefs and their proposed Findings of Fact and Conclusions of Law.

Upon the entire record and the file in this matter, I make the following Findings of Fact:

First, that the plaintiff, Carl Welty, is 82 years old and a retired college professor, ornithologist and author.

The plaintiff, Susan Welty, is 79 years old, a former teacher and an author.

The defendant, David Heggy, is 51 years of age. He was a commercial airlines pilot for 30 years, is now retired, and is

obviously an intelligent and knowledgeable person.

The defendant, David Heggy, has continuously resided in the State of Wisconsin from 1978 to the present time. He has resided in the only house that is on a street called Denture Lane on Highway X, Route 1, Beloit, Wisconsin, within the Town of Turtle, Rock County, Wisconsin.

The defendant's property is contiguous to the plaintiffs' property. And the plaintiffs have resided at their same address continuously as the Court recalls at least prior to 1978, and as the Court recalls it was even earlier than the 1970's.

The poll list of the Town of Turtle for the spring election on April 5, 1983, showed that the defendant, David Heggy, had a post-office address of Route 1, Beloit, Wisconsin, and was a resident of

the Town of Turtle, Rock County, Wisconsin, residing at Route 1, County Highway X, Denture Lane, Ward 4, Beloit, Wisconsin.

The records of the Wisconsin Motor Vehicle Department show that the defendant, David Heggy, on May 6th, 1982, gave his address as Rural Route 1, Beloit, Wisconsin, and on November 1, 1982, as 613 Cross Street, Beloit, Wisconsin.

The defendant Heggy, as a partner in a business known as Rock Landscaping, on July 26th, 1982, registered a 1979 Mercedes-Benz automobile in the name of Rock Landscaping stating that the vehicle was kept at the Town of Turtle, Rural Route 1, Beloit, Wisconsin 53511, which was a personal car driven by the defendant.

On February 21, 1980, the defendant Heggy registered a 1980 Honda four-door

automobile in the name of Rock Landscape, certifying David Heggy of Denture Lane, Beloit, Wisconsin, as the owner.

A witness by the name of Gary E. Polglaze is an insurance agent, and he issued a homeowner's policy of insurance to the defendant Heggy by which he insured the defendant's residence at Route 1, Denture Lane, Beloit, Rock County.

This action was filed in Court on July 13, 1983.

John Torpy, a deputy sheriff for Rock County for 13 years, beginning on July 29, 1983, made eleven attempts at different times of day to serve the defendant with the summons and complaint in this action at his residence. Officer Torpy on one occasion found a shopper newspaper in the mailbox and once left his business card in the mailbox and in a window next to the door at the residence. Each time he had

to climb the fencegate to get to the house door. He rang the doorbell. He walked around the house once. He checked with the Town of Turtle officers and with other officers in the sheriff's department to see if they could give a further address, but he could learn no further address. He learned of no other address for Mr. Heggy through those inquiries. Between August 29 and September 8, 1983, he made five more attempts to serve the summons and complaint personally upon the defendant.

Joseph Sprecher, a Rock County sheriff, or deputy sheriff, for two and a half years, testified that he knew Mr. Heggy, and he attempted twice to serve the defendant in July of 1983 at the defendant's home. Mr. Heggy had previously advised Sprecher to knock on the door and step back from the door so Heggy could see who was at the door.

Officer Sprecher knew of no other address for Mr. Heggy.

Chadwick A. Kelley, a Rock County deputy sheriff for 16 years, had previously in 1982 attempted to serve Mr. Heggy unsuccessfully at his residence. Officer Kelley had gone in 1982 to the office of the Town Clerk of the Town of Turtle, and then to what he called as Vance, but which was obviously Varney Printing, located on Cross Street in Beloit. He there talked to the manager who told Officer Kelley that he had never heard of Heggy. Kelley was unable to serve Heggy at the printing shop. He made several unsuccessful attempts to reach Heggy by phone in 1982. In this action he attempted to serve Heggy on August 2nd, 3rd, and 4th, 1983, at his residence but was unsuccessful. He knew of no other address for Mr. Heggy.

Jimmy Brandenberg, a Rock County deputy

sheriff for 18 years, who knew Mr. Heggy, unsuccessfully attempted to serve the summons and complaint on Mr. Heggy at his residence in December of 1983 three times. He learned of no other address for the defendant.

The plaintiff, Carl Welty, called his attorney, Edward Grutzner, each time he saw activity at the Heggy property in order that Mr. Grutzner could be alert to alert the sheriff to serve Mr. Heggy. These times were on August 1, August 7 and August 16 and September 18, 1983.

I find that the plaintiffs exercised due diligence in attempting to serve the defendant personally with the summons and the complaint in this action and were unable to do so.

At the time of the first publication of the summons in this action on August 25, 1983, the plaintiffs mailed copies of the

summons and the complaint to the defendant, David Heggy, at the following four addresses:

David Heggy, P.O. Box 938, Beloit, Wisconsin 53511;

David Heggy, Route 1, Denture Lane, Beloit, Wisconsin 53511;

David Heggy, Route 1, Highway X, Beloit, Wisconsin 53511;

David Heggy, Route 1, Box 250, Denture Lane, Beloit, Wisconsin 53511; which were all of the addresses then known to the plaintiffs and the plaintiffs' attorneys.

The defendant, David Heggy, refused to provide a mail receptacle at his home residence, and, therefore, he did not and could not receive mail addressed to his residence.

The defendant Heggy had used Post Office Box Number 938 at Beloit, Wisconsin Post Office but discontinued using that post

office box in April or May of 1983. David Heggy did not place a forwarding order or leave a forwarding order for mail with the Beloit Post Office.

Norma Woodman, the Town Clerk of the Town of Turtle, produced the town poll list which showed that David Heggy resided at Route 1, Beloit, Town of Turtle, where he was registered to vote, and that Route 1, Beloit, was his mailing address.

Bonnie Wetter, a Vice-President and Trust Officer of the Heritage Bank of Beloit and Heritage Trust Company, handled the Estate of Glen Heggy, the deceased father of the defendant, David Heggy. For many years she wrote to David Heggy many times at Denture Lane and never knew any other address for David Heggy.

The defendant, David Heggy, used the following addresses in 1983:

Denture Lane, Beloit, Wisconsin 53511;

Route 1, Beloit, Wisconsin 53511;

P.O. Box 938, Beloit, Wisconsin 53511;

Route 1, Highway X, Beloit, Wisconsin 53511;

Route 1, Box 250, Denture Lane, Beloit, Wisconsin.

The defendant for approximately two years had instructed certain people, but only certain people, to use a mailing address for him of 613 Cross Street, Beloit, Wisconsin, which was the street address of Varney Printers. David Heggy never lived at 613 Cross Street, Beloit, Wisconsin, and that address is not the address of a residence but a commercial printing establishment.

John Varney, the owner of Varney Printers at 613 Cross Street, Beloit, Wisconsin, received mail at that address addressed to David Heggy and placed it in a box. That mail was picked up

occasionally every couple of weeks or every month by David Heggy, or every month or every six weeks by David Carpenter, a person employed by Mr. Heggy.

The plaintiffs had no other known address for the defendant, David Heggy, other than his residence, until they received a package on November 26, 1983, postmarked from Minneapolis, Minnesota, with a 613 Cross Street return address, which they believed to be fictitious.

The defendant, David Heggy, has refused to accept mail at his residence. Copies of the summons and complaint sent by the plaintiffs to the defendant, David Heggy, addressed to his residence have been returned to the attorney for the plaintiffs marked, "Return to Sender, Not Deliverable as Addressed, No Forwarding Order on File, No Receptacle to Receive Mail on Route 1, Denture Lane, P. O. Box

Closed."

The defendant testified that he received no mail addressed to him at any address from July 13th, 1983, until January 9th, 1984; that during that time he had no telephone communication with anyone in the Beloit area; that during the period of time from July 13, 1983, until July 9, 1984 --

MR. GRUTZNER: You misspoke, you meant January

MR. FRANK KINAST: January, I think, Judge.

THE COURT: I'm sorry, I'll start again. During the period of time from July 13, 1984 -- strike that. During the period of time from July 13, 1983, until January 9 of 1984, he was never in the State of Wisconsin. If this testimony is true, mail addressed to him at 613 Cross Street, Beloit, Wisconsin, in care of Varney

Printers would not have reached him during the pendency of this action. And I will comment in a minute upon mail addressed to him by an attorney by the name of John Borgerding that he testified that he did not receive until he returned to Beloit in January of 1984.

From this evidence I find that the plaintiffs exercised due diligence in mailing copies of the summons and complaint to the defendant in this action.

The defendant, David Heggy, filed an affidavit in support of his motion to vacate the judgment that he was not in the State of Wisconsin from July 13, 1983, until January 7, 1984.

The defendant, David Heggy, testified at the hearing on January 23rd and February 14th that he was not in the State of Wisconsin from July 13, 1983, until January 9th , of 1984.

From the credible evidence I find that the defendant, David Heggy, was seen at his residence during the pendency of the action.

Miles Carson -- strike that. Miles Carlson, a near neighbor of Heggy, who knew Heggy and had known him for many years, saw David Heggy in the first half of October of 1983 when David Heggy was unlocking his front gate. Mr. Carlson passed while jogging within a car length of David Heggy. Carlson believed that he saw Heggy previously in the summer after July of 1983 when Heggy was on his lawn and Carlson was running or driving. Carlson identified Heggy in the courtroom. Carlson also testified that within an hour of having seen Mr. Heggy, he told his wife that he had seen David Heggy.

Melvin McCabe, a Town of Turtle employee for eight years, who worked on the roads

in the Town of Turtle, and who knew Heggy for three or four years, saw David Heggy after August 8, 1983, and before October of 1983, when the defendant was mowing his lawn at his residence on his garden tractor. David Heggy and Mr. McCabe waved at each other at a distance of 20 to 30 feet while McCabe was on a slow-moving mower.

Leroy Laursen, a Town of Turtle highway department worker for fifteen years, and who knew David Heggy, saw David Heggy in August or early September of 1983 and passed within 20 yards of Heggy, who was then mowing the grass at the shoulder of the road in front of his residence.

David Heggy employed a caretaker named David Carpenter in 1983. He was 24 years old. He was employed to look after and maintain his residence on Denture Lane. Carpenter has worked for Heggy

continuously from 1978 to the present. Parts of his deposition were read into evidence, the deposition taken on December 30th, 1983. His testimony and parts of that deposition show that David Carpenter in about September of 1983 met with David Heggy and Suzanne Hall, a woman with whom Heggy has lived for several years. They met at the Ace Tavern in South Beloit, Illinois, Carpenter brought the mail to David Heggy and sat with only Heggy and Suzanne Hall in a booth in the tavern, which was quiet and uncrowded. Neither David Heggy, Suzanne Hall nor David Carpenter were intoxicated.

David Carpenter had learned before the meeting of the lawsuit filed by the Weltys by reading about it in the newspapers either in the legal section or in an article regarding the action, and then knew of the pending legal action. David

Carpenter told David Heggy and Suzanne Hall of the pending lawsuit brought against David Heggy by the plaintiffs. David Carpenter had read it in the papers and he had -- and Suzanne Hall said, "Yes, we know about it." David Heggy was there present and heard that conversation and did not deny the response given by Suzanne Hall.

David Carpenter never did any washing or laundry at the Heggy home. In September of 1983 when David Carpenter spoke to David Heggy and Suzanne Hall, Carpenter knew of no other action pending against David Heggy, except the action brought by the Weltys whom Carpenter knew.

John Borgerding, a Beloit attorney who had previously represented Mr. Heggy, wrote about this lawsuit to David Heggy on October 25, 1983. He signed the letter, stamped and addressed the envelope, and he

himself placed it in the mail addressed to 613 Cross Street, Beloit, in care of Varney Printers, because he had been told by Heggy to write him at that address. Mr. Borgerding never received the letter back. That letter read in part: "You have been sued by Welty for a total of $500,000 for the alleged harassing things he claims you did. At this point unless you take remedial steps immediately, you could lose plenty."

David Heggy has intentionally evaded the service of the summons and the complaint in this action at his residence in Wisconsin.

The defendant, David Heggy, has in the past evaded service of process.

Between August 24 and September 6th, 1982, Rodney Magneson, a part-time police officer of the Town of Turtle, who could recognize Heggy on sight, saw Heggy.

Magneson then in a squad car and in police uniform saw Heggy in the yard near his home and stopped the police car in Heggy's drive in an attempt to serve a bench warrant on Mr. Heggy. Magneson got out and climbed the gate while Heggy walked toward and entered the house. Magneson walked to the house and knocked on the front door, which Suzanne Hall opened. Magneson was, however, not able at that time to serve the bench warrant on Heggy, because David Heggy would not come to the door.

Over a period of years Bonnie Wetter, the Trust Officer previously mentioned, sent letters to the defendant Heggy at Denture Lane, which were never returned.

Deputy Sheriff Chad Kelly was unable to serve an order for Bonnie Wetter on Heggy on February 25, 1982. Bonnie Wetter hired the sheriff to serve papers on Heggy March

12, 1982, but he was not successful in serving Heggy. David Heggy refused to communicate with Bonnie Wetter over a period of years.

Richard Walsh was told by David Heggy in the summer of 1981 that on one evening, either an officer, a sheriff or a deputy or constable had knocked on Heggy's residence door and David Heggy ran out the back door, walked down the railroad tracks and caught a ride to South Beloit, Illinois, because David Heggy did not want to see the officer.

Other facts indicate that the defendant, David Heggy, was present when service of the summons and complaint in this action was attempted.

On August 16, 1983, colorful women's laundry was on the Heggy clothesline. The caretaker had not placed the laundry there. He testified that he'd never did

laundry at the Heggy residence.

On one occasion an automobile was observed in the driveway by Deputy Sheriff Torpy with a flat tire, and the next day the tire appeared to be fixed.

While David Heggy and Suzanne Hall testified that they had stayed at the Totem Lodge in Sioux Narrows, Ontario, Canada, from August 8 to November 29, 1983, and the owner of that establishment testified likewise, there were charter flights from Sioux Narrows to Kenora and International Falls, and from there to O'Hare Field in Chicago. And it was testified, and it is clear from the evidence, that a person registered at the Totem Lodge, because of its location and arrangement, could stay out of sight for a week or so and no person see the individual involved.

The Court did obtain personal

jurisdiction over the defendant because the evidence shows that the defendant was served by publication and mailing pursuant to Section 801.11(1)(c). That statute provides in part:

> "..., service may be made by publication of the summons as a class 3 notice,... and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot -- cannot be ascertained with reasonable diligence."

"The service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal

jurisdiction, notwithstanding actual knowledge by the defendant." And then there are some citations. And that is a quote taken from the case of Span v.Span, 52 786, at page 789, a 1971 decision of the Wisconsin Supreme Court.

And from the case of West v. West, reported at 82 Wis.2d 158, and I will read from page 166, a 1978 decision of the Wisconsin Supreme Court,

> "... one who seeks substituted service by publication must first exhaust with due diligence any leads or information reasonably calculated to make personal service possible."

And then from the case of Beneficial Finance Company v. Lee, 37 Wis.2d 263, and I will read from page 269, 1967 decision,

"'For a court to obtain jurisdiction over a person, a summons must be served as provided by the statutes. Slipshod and haphazard attempts to serve are not sufficient.'"

In this case the statement is made that the Heggy -- that the Weltys should have learned of the Cross Street address and made a mailing to the Cross Street address. But David Heggy only disclosed that address to persons whom he wanted to know the address. And the address was never disclosed at any time until a package was received in late November of 1983 after the mailing had already been made.

Further than that, the testimony is undisputed that even though the summons and complaint had been mailed to Mr. Heggy at that address, he wouldn't have received

it, because mail addressed to him at that address he himself testified that he did not receive from sometime in July until he came back to Beloit in early January of 1984.

In this regard I make the following Conclusions of Law:

That the Court had jurisdiction over the defendant, David Heggy, at the time it rendered judgment.

David Heggy at all times pertinent to this action did reside at Denture Lane, Highway X, Route 1, Turtle Township, Beloit, Rock County Wisconsin.

And that the plaintiffs did exercise reasonable diligence --

MR. GRUTZNER: May I turn that? (Pause) Thank you.

THE COURT: -- to serve the summons and complaint personally pursuant to Section 801.11(1)(c) of the Statutes.

And, finally, that the plaintiffs exercised reasonable diligence to mail a copy of the summons and complaint to the defendant's post office address pursuant to Section 801.11(1)(c) of the Wisconsin Statutes.

Reasons do not exist in this case justifying relief from the operation of the judgment under Section 806.07(1)(h) of the Wisconsin Statute. That statute provides in part:

> "Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party from a judgment, order or stipulation for the following reasons:"

And subsection (h) provides:

> "Any other reasons justifying relief from the operation of the judgment."

"...Section 806.07(1)(h) of the Statutes gives the court broad discretionary authority to grant relief from a judgment.... That section is based on Federal Civil Procedure Rule Number 60. Federal cases interpreting that provision indicate that it must be liberally construed to allow relief from judgments 'whenever such action is appropriate to accomplish justice.'"

And that is a citation taken from the case of Conrad v. Conrad, reported at 92 Wis.2d 407, and the citation -- or the quote is at page 418, a 1979 decision of the Wisconsin Supreme Court.

Our Supreme Court in the case entitled In the Matter of the Estate of Smith, reported at 82 Wis.2d 667, at page 674, in 1978 stated:

"... The scope of Section 806.07(1)(h)

is analyzed in Graczyk, The New Wisconsin Rules of Civil Procedures, Chapters 805-807, 59 Marquette Law Review 671, 727 (1976). Therein the author stated:

"'The former rule limited the number of circumstances under which a motion to vacate a judgment could be sought. The new rule considerably expands this list, while subsection (1)(h) gives the court wide discretion to entertain the motion for other justifiable reasons.'"

In the case of Hedtcke v. Sentry Ins. Co., reported at 109 Wis.2d 461, at page 471, a 1982 decision of the Wisconsin Supreme Court, Justice Abrahamson, writing for the Court, stated:

"Because 'the exercise of discretion is not the equivalent of unfettered

decision-making,' the record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case." And then a citation. "This court has described the role of the -- the roles of the circuit court and the appellate tribunal with respect to issues within the discretion of the circuit as follows:

"'The trial court must undertake a reasonable inquiry and examination of the facts as the basis of its decision. The exercise of discretion must depend on facts that are of record or that are reasonably derived by inference from the record and the basis of that exercise of discretion should be set forth. This court will not find an abuse of discretion if the record shows that discretion was in fact exercised and if

the record shows that there is a reasonable basis for the trial court's determination.'" And then a citation.

From the case of Charolais Breeding Ranches v. Wiegel, a 1979 decision of the Wisconsin Supreme Court reported at 92 Wis.2d 498, and I read from page 512, the Court states:

"Factors favoring upholding a denial of a motion to vacate a judgment are... a policy in favor of the finality of judgments, and probability that a policy which excused or tolerated... neglect'", or in this case obvious conduct to avoid service of process through reasonable and diligent efforts, "'would foster delay in litigation...'"

And then from the case of Hansher v. Kaishian, reported at 79 Wis.2d 374, at

page 391, a 1977 decision:

> "...A reasonable degree of prudence should be required whichever of the statutory grounds are relied upon to justify relief."

In a recent case, the case of CKS Engineers, Incorporated, v. White Mountain Company, decided January 30, 1984, and this is Case Number 83-1609 of the United States Court of Appeals for the Seventh Circuit, Judge Flaum writing for the Court said in part:

> "On 5-20-82 another attorney appeared for the defendants and moved that the default judgment be vacated under Federal Rule of Civil Procedure 60(b). Denial of this motion is affirmed. Rule 60(b) is applied liberally in the default judgment context only if the

events contributing to the default judgment have not been within the meaningful control of the defaulting party. For a default judgment to be an effective deterrent against irresponsible conduct in litigation, relief from a default judgment under Rule 60(b) must be perceived as an exceptional remedy."

In that case, and he stated:

"The large amount of the judgment, $660,000 does not require reversal absent a good excuse for the default."

In this case from the evidence I find that the defendant, David Heggy, has not shown excusable neglect.

The defendant has refused to accept his mail at his residence.

The defendant has not shown that neglect

which might been the acts of a reasonably prudent person under the same or similar circumstances.

The defendant has intentionally and purposefully evaded service of the summons and the complaint in this action.

The defendant was present at his home at least twice during the pendency of this action, and the defendant was told by his employee in September of 1983 of the pendency of this action.

The defendant has not acted in a reasonable manner and has purposely made personal service and service by mailing through reasonable diligence impossible.

The defendant has been neglectful, careless and inattentive in this matter, and he has not demonstrated that he has exercised a reasonable degree of prudence on his own part.

As a matter of fact, I think to set

aside this judgment instead of doing justice would do a grave injustice to the plaintiffs in this action, and the interests of justice would not be served by setting aside the judgment under the provisions of Section 806.07(1)(h) of the Wisconsin Statutes.

Finally, the judgment of the trial Court was based upon the evidence presented, and the damages awarded were not excessive.

I would point out that while I have only been a Judge for some four and a half years, or approximately something over four years, I was a trial attorney for some 30 years and also taught at the University of Wisconsin Law School and have been active in legal education in Wisconsin for some considerable period of time and now am active in judicial education. So I feel the Court has some knowledge of the trial and the evidence

that was presented in this matter and the amount of damages that should have been awarded.

The record contains no errors in the admission of evidence, because the trial Court clearly understood the three Statutes of Limitations involved and correctly applied those statutes to the evidence.

The causes of action or claims against the defendant, David Heggy, are grounded upon allegations of a continuous course of intentional conduct, and, thus, all acts in the continuum comprised the causes of action and were admissable.

The circumstantial and indirect evidence of the commission of the acts by David Heggy for which there were no eye witnesses were proved by the greater weight of the credible evidence to a reasonable certainty.

Extreme, disabling emotional response, an injury suffered by the plaintiffs, was proved by the testimony of the psychiatrist, Doctor Roberts, who in the knowledge of the Court has had long experience in the field of forensic psychiatry.

The punitive damage awards were not excessive in view of the extreme outrageous, and I underscore the words outrageous and intentional, nature of the defendant's conduct, and the severe emotional distress suffered by these plaintiffs.

Carl Welty is 82 years old. Susan Welty is 79 years of age. A retrial of this action would place an unwarranted and unnecessary burden upon them and would place the Court in the position of aiding one who has purposely thwarted the legal process. The plaintiffs would be

prejudiced by the Court setting aside this judgment.

There has been no miscarriage of justice. The Findings of Fact made by the Court, dated December 10, 1983, are not erroneous. There is no evidence in the record which would indicate that a jury verdict would or should be for a lesser amount than was awarded by the Court.

The defendant's motion has been brought pursuant to, and I realize solely upon the provisions of Section 806.07(1)(h) of the Wisconsin Statutes, and not upon Section 806.07(1)(a) of the Statutes as has been stated and agreed to by counsel and the Court.

Based upon this decision and the Court's reasoning, the defendant's motion to set aside the judgment grounded upon Section 806.07(1)(h) is denied.

Mr. Grutzner, I will direct that you

draw an Order denying the defendant's motion. And that concludes the Court's decision in this matter.

STATE OF WISCONSIN, CIRCUIT COURT, BR. 5, ROCK COUNTY

Carl Welty and
Susan Welty,
Plaintiffs,

ORDER
Case No.
83 CV 938

v.

David Heggy,

Defendant.

The defendant, David Heggy, has served and filed his motion, dated January 14, 1984, in which he requests that the court set aside the judgment entered in this action, dated December 10, 1983, and all subsequent proceedings, to let the defendant defend the action, to file and serve his answer, on such terms as may be just, all pursuant to sec. 806.07(1) Stats. Counsel for defendant at the commencement of the hearing stated the motion more specifically was brought pursuant to paragraph 806.07(1)(h) Stats. and not any other paragraph of Subsection 806.07(1) Stats.

Testimony was taken January 23, and February 14, 1984. Counsel for both parties have filed briefs of the law and proposed findings of fact and conclusions of law. On April 6, 1984, counsel argued the case before me.

The court in open court announced its decision containing its findings of fact

and conclusions of law.

Upon motion of Edward Grutzner, Attorney for the plaintiffs, it is

Ordered that the motion of the defendants, pursuant to Sec. 806.07(1)(h) Stats., to set aside the judgment dated December 10, 1983, is denied. Motion costs of $50.00 are allowed the plaintiffs.

Dated: April 9, 1984.

BY THE COURT:

(Signed)
J. Richard Long, Circuit Judge
Branch 5, Rock County, Wisconsin

Excerpts from February 1, 1984 Hearing on Motion to Vacate [pp. 185ff.]

COURT: ... I would direct your attention to Vol. 62 of American Jurisprudence, 2d under the heading Process, Sec. 69. And I will read just briefly from that. "The general doctrine that a personal judgment upon constructive or substituted service of process upon a nonresident defendant who does not appear is contrary to due process of law, and is valid neither in the state where rendered nor in any other state in which its enforcement may be sought, does not necessarily preclude the recovery of a personal judgment against a resident of the state upon substituted or constructive service of process. The rule as laid down in Pennoyer v. Neff, is confined to personal judgments against non residents of the state, and in the great majority of

the cases presenting the question the Courts have declined to apply the doctrine to personal judgments against residents of the state or domestic corporations, but for the most part have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the state, and notice was given in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding before a judgment or decree was rendered agaist him." And then from page--paragraph 70. It states, "When authorized by statute, jurisdiction to render a personal judgment may be based up[on] publication on a defendant who is a resident of and within the state, when he

cannot be found therein because he conceals himself to avoid the service of process. The fact that a person served by publication is in fact a resident of the state and might have been served there is insufficient to avoid a decree, where the statute provides for service by publication on a resident, as well as on a nonresident, if not found after diligent search and inquiry." And then from section 71 which is headed "Effect of defendant's absence from state. It is not quite generally recognized that the fact that the defendant was without the state at the time of the substituted service by leaving a copy of the summoms at his usual place of abode in the state does not invalidate the service for the purpose of the rendition of a judgment in personam. As the Supreme Court of the United States has pointed out the authority of a state

over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicil may also exact reciprocal duties. One such incident of domicil is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method of apprising such an absent party of the proceedings against him." And then finally from page or paragraph 73, "Publication and mailing. According to the prevailing view, a personal judgment may be rendered against a resident of the state who has been notified by means of service by publication and provided it appears that actual personal service could not be made. The general rule is especially true where the statute in

addition to authorizing the service by publication, requires it to be mailed to the defendant's address, some decisons going apparently to the extent of requiring such mailing in order to impart validity to the service by publication."

Excerpts from Plaintiffs' Trial Court Memorandum [pp. 3ff., 20ff.]

At 62 Am Jur 2d, Process § 69, reads in part as follows:

"§69. Generally.

The general doctrine that a personal judgment upon constructive or substituted service of process upon a nonresident defendant who does not appear is contrary to due process of law, and is valid neither in the state where rendered nor in any other state in which its enforcement may be sought,[1] does not necessarily preclude the recovery of a personal judgment against a resident of the state upon substituted or constructive service of process.[2] The rule as laid down in Pennoyer v. Neff,[3] is confined to personal judgments against nonresidents of the state,[4] and in the great majority of the cases presenting the question, the courts have declined to apply the doctrine to personal judgments against residents of the state or domestic corporations, but for the most part have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the state,[5]

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No. 85-382

In The
Supreme Court of the United States
October Term, 1985

DAVID HEGGY,
Petitioner,

vs.

CARL WELTY and SUSAN WELTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

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QUESTIONS PRESENTED

Was the finding of fact by the Wisconsin Trial Court that the Respondents used due diligence to locate the Petitioner's post office address for mailing copies of the summons and complaint, arbitrary or capricious?

Do the facts that Respondents made extensive efforts including those of four process servers, to locate the Petitioner, constitute facts supporting the findings of due diligence by Respondents to locate Petitioner's post office address?

Where Respondents, after exercising due diligence to locate Petitioner personally, mailed copies of the summons and complaint to Petitioner's known residence, when the mailed summons and complaint were returned by the post office because Petitioner refused to accept mail at his residence and the Petitioner evaded the service of process, are there any facts to support the finding of due diligence to locate Petitioner's secret mailing address?

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SUPPLEMENTARY STATEMENT OF THE CASE

The Petitioner, David Heggy, has made many factual errors in his statement of the case, and has omitted many significant facts.

The facts set forth in this supplementary statement of the case are taken from the findings of fact contained in the memorandum decision made by the trial court, the Honorable J. Richard Long, Circuit Judge for Rock County, Wisconsin, Branch 5, dated April 6, 1984, and affirmed by the Wisconsin Court of Appeals. At the time the findings were made, the case was before the trial court for decision on the motion of David Heggy, then the defendant, to set aside the judgment entered by default in the action and to let him file and serve his answer and defend the action.

Since 1978, David Heggy resided next door to the Weltys in the only house that is on a street called Denture Lane on Highway X, Route 1, Beloit, Wisconsin, within the Town of Turtle, Rock County, Wisconsin, (A-51) as evidenced by the poll list of the Town of Turtle for the Spring election on April 5, 1983.

John Torphy, a deputy sheriff for Rock County for 13 years, beginning on July 29, 1983, made eleven attempts at different times of day to serve David Heggy with the summons and complaint in this action at his residence. He checked with other Town of Turtle officers and with other officers at the sheriff's department to see if they could give a further address, but he could learn no further address. Between August 29 and September 8, 1983, he made five more attempts to serve the summons and complaint personally on David Heggy. (A-54).

Joseph Sprecher a deputy sheriff for two and one half years knew Mr. Heggy and attempted twice to serve him at his home. Mr. Heggy had previously told Joseph Sprecher to knock on the door and step back from the door so Heggy could see who was at the door. (A-54). Joseph Sprecher knew of no other address for Mr. Heggy. (A-55).

Chadwick A. Kelley, a Rock County Deputy Sheriff for 16 years had previously in 1982 attempted unsuccessfully to serve Mr. Heggy at his residence. Officer Kelley had in 1982 gone to the office of the Town Clerk of the Town of Turtle and then to Varney Printers on Cross Street in Beloit. He there talked to the manager who told officer Kelley he had never heard of Heggy. Officer Kelley was unable to serve Heggy at the printing shop in 1982. He made several unsuccessful attempts to reach Heggy by phone in 1982. In this action Officer Kelley attempted three times unsuccessfully to serve Heggy at his residence. He knew of no other address for Mr. Heggy. (A-55).

Another Rock County Deputy Sheriff for 18 years, Jimmy Brandenberg who knew Mr. Heggy, unsuccessfully attempted three times to serve Mr. Heggy at his residence in December of 1983. Mr. Bradenberg learned of no other address for Heggy. (A-56).

The Respondent, Carl Welty, called his attorney Edward Grutzner each time he saw activity at the Heggy property: on August 1, 7, 16 and September 18, 1983, in order that Mr. Grutzner could alert the sheriff to serve Mr. Heggy. (A-56).

The trial court found that the Weltys exercised due diligence in attempting to serve the summons and complaint personally upon David Heggy. (A-56) (A-75).

At the time of the first publication of the summons on August 25, 1983, the Weltys mailed copies of the summons and complaint to David Heggy at the following four addresses:

P.O. Box 938, Beloit, WI 53511

Route 1, Denture Lane, Beloit, WI 53511

Route 1, Highway X, Beloit, Wisconsin 53511

Route 1, Box 250 Denture Lane, Beloit, Wisconsin 53511

These four addresses were all of the addresses then known to the Weltys and their attorneys. (A-57).

David Heggy refused to provide a mail receptacle at his home residence and, therefore, he did not and could not receive mail addressed to his residence. (A-57).

Mr. Heggy had used Post Office Box number 938 at Beloit, Wisconsin, but discontinued using that post office box in April or May of 1983. He did not leave a forwarding order for mail with the Beloit Post Office. (A-58).

David Heggy in 1983 used the four addresses to which the Weltys sent copies of the summons and complaint. (A-58).

Petitioner David Heggy for approximately two years had instructed certain people, but only certain people, to use a mailing address for him of 613 Cross Street, Beloit, Wisconsin, which was the street address of Varney Printers. David Heggy never lived at this address which was not a residence but a commercial printing establishment. (A-59).

Mail addressed to David Heggy at 613 Cross Street was placed in a box and was picked up every two weeks to one month by Mr. Heggy or every month to six weeks by David Carpenter, a person employed by Mr. Heggy. (A-60).

The Weltys received a package on November 26, 1983 postmarked from Minneapolis, Minnesota with a 613 Cross Street return address, which the Weltys believed to be fictitious. (A-60).

Copies of the summons and complaint sent by the Weltys to Mr. Heggy addressed to his residence were returned to the attorney for the Weltys marked:

> "Return to sender, not deliverable as addressed, no forwarding order on file, no receptacle to receive mail on Route 1, Denture Lane, P.O. Box closed." (A-60).

David Heggy testified that he received no mail addressed to him at any address nor did he have any telephone communication with anyone in the Beloit area from July 13, 1983 until January 9, 1984. (A-61).

The trial court found that the Weltys exercised due diligence in mailing copies of the summons and complaint to Petitioner. (A-62) (A-75).

The trial court found that Mr. Heggy was seen at his residence during the pendency of the action. (A-63) Miles Carlson, a near neighbor of Mr. Heggy, who had known David Heggy for many years, saw him the first half of October 1983, while jogging within a car length of David Heggy.

A Town of Turtle employee for eight years who knew Mr. Heggy for three or four years saw David Heggy after August 8, 1983 and before October 1983. They waved at

each other at a distance of 20 to 30 feet while the employee was on a slow moving vehicle. (A-64).

Another Town of Turtle highway department worker for fifteen years and who knew Mr. Heggy, saw David Heggy in August or early September of 1983, having passed within 20 yards of Heggy who was mowing his grass. (A-64).

David Heggy employed a caretaker named David Carpenter, who in about September of 1983, met with David Heggy and Suzanne Hall, a woman with whom Heggy had lived for several years. Mr. Carpenter told David Heggy and Ms. Hall of the pending lawsuit brought against David Heggy by the Weltys. Suzanne Hall said, "Yes, we know about it." David Heggy was present then, heard that conversation and did not deny the response given by Suzanne Hall. (A-66).

John Borgerding, a Beloit attorney who then represented Mr. Heggy in other matters, wrote about the lawsuit to David Heggy on October 25, 1983. He addressed the envelope to David Heggy at 613 Cross Street, Beloit, Wisconsin, in care of Varney Printers. (A-67). Mr. Borgerding never received the letter back. That letter read in part: "You have been sued by Welty for a total of $500,000, for the alleged harassing things he claims you did." (A-67).

The trial court found David Heggy had intentionally evaded service of the summons and the complaint in the action at his residence in Wisconsin. (A-67)

On Aug[illegible] 16, 1983, colorful woman's clothing was on the Heggy clothesline which the caretaker did not place there. (A-69).

however, that Petitioner did not raise the federal questions, sought now to be raised, in the trial court.

Petitioner stated to the trial court:

"Because the trial court was without jurisdiction over Heggy due to the failure of Weltys to exercise due diligence to ascertain Heggy's post office and mail a copy of the summons and complaint to his post office address at or immediately prior to the first publication of the summons, Heggy respectfully moves the court to vacate the judgment. . ."

Petitioner did not raise the issue of due process in either of his briefs filed in support of his motion to vacate the default judgment.

In his oral argument April 6, 1984 in support of the motion to vacate the judgment, counsel for Heggy did not present any issue of due process. He did argue: " . . . the service by publication in order to be legal must have had the plaintiff using due diligence to ascertain the post office address of the defendant."

The trial court understood:

> "The defendant's motion has been brought pursuant to, and I realize solely upon the provisions of Section 806.07(1)(h) of the Wisconsin Statutes and not upon section 806.07(1)(a) of the statutes as has been stated and agreed to by counsel and the Court." (A-86)

The Wisconsin Statute reads as follows:

> "806.07 Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, excusable neglect; . . . .

(d) The judgment is void; . . .

(h) Any *other* reason justifying relief from the operation of the judgment." [emphasis added]

The trial court understood that the motion to vacate was based solely upon the allegation that Weltys failed to exercise due diligence to ascertain the post office address of Heggy.

Respondents' 85 page brief submitted to the trial court contained quotations from 62 Am Jur 2d "Process" "Generally," section 69, which read in part:

> "If actual service is impracticable nothing more is essential to the due process of law than the service provided for be such as in the exercise of legislative discretion shall have been found most suitable to accomplish the purpose of actual service."

The brief made two other references to "due process". Weltys made no argument regarding due process, but cited the law in support of their position that service was made in a manner such that:

> "The reasonable probabilities were that the defendant would receive notice."

This inclusion in the *Weltys* brief of a reference to due process does not constitute a raising of that issue by the *Petitioner* David Heggy. Nor does the trial court's repetition of that citation from American Jurisprudence in a statement made February 1, 1984 to counsel prior to briefing constitute a passing upon the due process issue.

The constitutional issue was neither raised, nor briefed nor decided in the trial court.

Petitioner in his brief filed with the Wisconsin Court of Appeals did claim there was a denial of due process.

The Weltys in their reply brief before the Appellate Court replied only that this issue was raised for the first time on appeal and thus appellant waived his right to that argument. Thus the issue of due process was not briefed on appeal by the Weltys.

The Court of Appeals in its decision held:

> "The defendant contends here for the first time that plaintiffs' attempts at service fell short of due process standards. . . ." (A-16) . . . . Under these circumstances we decline to address the defendant's constitutional argument." (A-18)

In his brief to the Wisconsin Supreme Court, the entire due process argument of counsel for Heggy after citation of law was:

> "Instant record indicates that plaintiffs did not truly desire to give actual notice of the suit to defendant, and in fact, prior to trial were concerned lest he learn of it (Exh. 94, p. 46). Clearly due process was denied defendant."

The Respondents in their brief to the Wisconsin Supreme Court, did not respond to the due process argument except to say:

> "Heggy's assertion that the Weltys did not in good faith try to serve him is unsupported by the record."

The Petitioner engages in hyperbole when he argues that the trial court decided the constitutional issues. One reads the findings of the trial court at pages 49-87 of the appendix, in vain for a finding of fact or conclusion of law regarding due process or the constitutional question.

Even more difficult to follow is Petitioner's argument that the Court of Appeals actually decided the constitutional issue, when that court specifically stated:

> "Neither compelling reasons nor the interest of justice require us to address defendant's constitutional claim, and we therefore decline to address it." (A-18)

II. NO FEDERAL QUESTION EXISTS FOR REVIEW BY THE UNITED STATES SUPREME COURT BECAUSE PETITIONER'S CHALLENGE IS TO THE COURT'S FINDING OF FACT OF REASONABLE DILIGENCE, WHICH FINDING IS NOT CLEARLY ERRONEOUS AND IS SUPPORTED BY SUBSTANTIVE EVIDENCE.

The Wisconsin Court of Appeals observed:

> "Defendant's constitutional argument is essentially an attack on plaintiffs' reasonable diligence which we have already resolved in plaintiffs' favor insofar as sec. 801.11 (1) Stats. requires it." (A-18)

> "The supreme court has treated 'reasonable diligence' as a finding of fact to be affirmed unless against the great weight and clear preponderance of the evidence," [citations omitted] "this test is essentially the same as the clearly erroneous standard of sec. 805.17 (2), Stats., which we now apply to findings made by the court." (A-7)

The Wisconsin Court of Appeals then thoroughly reviewed the facts in the case and affirmed all the relevant findings of fact made by the trial court, ruling that they were not clearly erroneous. (A-10 to A-16).

The fourteenth amendment to the United States Constitution does not, in guaranteeing due process of law, assure immunity from judicial error.

> *Stein v. New York,* 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L ED 362, 74 S Ct 13 and (overld on other grounds *Jackson v. Denno,* 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205).

"The Fourteenth Amendment is not a guaranty that a trial shall be free from error; to constitute a taking of property without due process of law by force of a judgment in such proceedings, such error must be gross and obvious, coming close to the boundary of arbitrary action." *Roberts v. New York City,* 295 US 264, 79 L Ed 1429, 55 S Ct 689.

> "The Federal Supreme Court cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power. . . ." 16 A Am Jur 2d Constitutional Law section 820. *American R. Express Co. v. Kentucky,* 273 US 269, 71 L Ed 639, 47 S Ct 353; *Corrigan v. Buckley,* 271 US 323, 70 L Ed 969, 46 S Ct 521; *West v. Louisiana,* 194 US 258, 48 L Ed 965, 24 S Ct 650 (ovrld on other grounds *Pointer v. Texas,* 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065); *Ladner v Siegel,* 298 Pa 487, 148 A 699, 68 ALR 1172.

In *Bell Telephone Co. v. Pennsylvania Public U. Com'n,* 309 US 30, 60 S Ct 411, 412 L Ed (1940) in a per curiam decision, the court stated:

> "In the absences of other constitutional objections, it cannot be said that a State Court denies due process when on appropriate hearing it determines that there is *evidence to sustain a finding.* . . . The contention that such a decision is erroneous does not present a federal question." [citations ommitted] [Emphasis added.]

The trial court made a painstaking analysis of the evidence presented at the motion to vacate the judgment. His review of the applicable law was scholarly. The

court's findings of fact and conclusions of law were detailed. Such judicial work may not be characterized as arbitrary or capricious. The Court of Appeals' decision in sustaining the trial court's findings relating to reasonable diligence, indicates a careful and accurate analysis of the record.

No federal question exists because the findings of due diligence were amply supported by the evidence and were not clearly erroneous. The case of *Barr v. City of Columbia,* 84 S Ct 1734, 1736, 378 U.S. 146, 12 L Ed 2d 766, cited by Petitioner, is a good example of a case where the Supreme Court found a violation of the due process clause of the constitution because the state court decision was arbitrary. In that case in 1964 five negro students were convicted in South Carolina for criminal trespass and breach of the peace where they sat at a lunch counter at which the policy was to serve whites only. The Supreme Court granting certiorari held that "there is a complete and utter lack of any evidence and no suggestion in the opinions of any of the courts below, that any of the petitioners did anything disorderly or did anything other than politely ask for service."

Mr. Justice Holmes in the case of *Chicago L. Ins. Co. v. Cherry,* 244 US 25, 61 L Ed 966, 37 S Ct 492, 493 (1917) said:

> "Whenever a wrong judgment is entered against a Defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 US 673, 74 L Ed 1107, 50 S Ct 451.

In *Corrigan v. Buckley,* 271 US 323, 70 L Ed 969, 46 S Ct 521, 524 (1926), the court stated:

> ". . . . there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation." [citation omitted] Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."

See also: *American R. Express Co. v. Commonwealth of Kentucky,* 273 US 269, 71 L Ed 639, 47 S Ct 353.

In 1939 speaking in the case of *Roberts v. City of New York,* 295 US 264, 79 L Ed 1429, 55 S Ct 689, Justice Cardozo said:

> " 'If there has been any wrong done it is due not to the statute, but to the courts having made a mistake as to evidence, or at most as to the measure of damages.' *McGovern v. City of New York,* 229 US 363, 370, 33 S Ct 876, 57 L Ed 1228, 46 L.R.A. (N.S.) 391 Not every such mistake amounts to a denial of constitutional immunities though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. *West Ohio Gas Co. v. The Public Utilities Commission,* 294 US 63, 70, 55 S Ct 316, 79 L Ed 761. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the border of arbitrary action."

See also 16C Corpus Juris Secundum: Constitutional Law, General Considerations, Section 964.

Where extensive efforts were made to find and serve the defendant personally, further inquiry is not required where the plaintiff has already mailed the summons and complaint to the defendant's known residence.

The question is annotated at 62 Am Jur 2d, Process, Section 117—"Sufficiency as to diligence to ascertain defendant's whereabouts."

There was substantial evidence to sustain the finding of due diligence. The United States Supreme Court should not exercise its supervisory power because the finding was not arbitrary or capricious.

Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

/s/ Edward Grutzner
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APPENDIX

The following are corrections of errors made in the Petitioner's appendix. All errors have not been corrected —only those which are significant to the Respondents' position.

At page A-12 the Petitioner has set forth the decision of the Wisconsin Court of Appeals in this case. Within that decision the Court of Appeals is quoting the relevant Wisconsin Statute Section 801.11(1)(c). The Petitioner omitted the words:

"by publication of the summons as a class 3 notice."

The corrected quotation reads:

> "If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice under ch. 985, and by mailing."

At page A-18 the Petitioner has set forth the decision of the Wisconsin Court of Appeals. The two omitted words "have" and "and" are underlined in the correct quotation below.

> "Neither compelling reasons nor the interest of justice require us to address defendant's constitutional claim, and we therefore decline to address it. Defendant's constitutional argument is essentially an attack on plaintiffs' reasonable diligence which we *have* already resolved in plaintiffs' favor insofar as sec. 801.11(1), Stats., requires it. The defendant was found to have actual notice of the action *and* to have purposely avoided service. Testimony in the record supports these findings, which are not clearly erroneous. Under these circumstances we decline to address the defendant's constitutional argument.

At page A-33 Petitioner has set forth the judgment of the Circuit Court dated December 10, 1983. The Petitioner has omitted the word "evidence".

The corrected paragraph reads as follows:

> "The court has taken testimony of the plaintiffs by default on December 7 and December 9, 1983. Plaintiffs have filed their brief of the law. Exhibits were received in *evidence* and counsel for the plaintiffs have argued their case to the court. The court has filed its findings of fact and conclusions of law in which it is directed that judgment be entered accordingly."

At page A-90 Petitioner has set forth excerpts from the February 1, 1984 Hearing on Motion to Vacate. The court stated to counsel prior to their briefing regarding the motion to vacate the default judgment:

> "I would like to direct your attention to Vol. 62 of American Jurisprudence 2d under the heading Process, Sec. 69 and I will read just briefly from that."
>
> (At page A-92)
>
> "And then from Section 71 which is headed 'Effect of defendant's absence from state.'"

The error was made by the typist for the trial court. The correct sentence as it is stated in American Jurisprudence reads:

> "However, it is *now* quite generally recognized that the fact that the defendant was without the state at the time of the substituted service by leaving a copy of the summons at his usual place of abode in the state does not invalidate the service for the purpose of the rendition of a judgment in personam." [Emphasis added]

The transcript of the court's statement reads "not" and the appendix filed by Petitioner reads "not."

Testimony of Susan Welty, February 1, 1984, at page 119:

"Q. And until January of this year did you know of any address of where Mr. Heggy lived other than at the Denture Lane address?

"A. No.

"Q. Did you know when you received the package with an address of 631 Cross Street what was at 631 Cross Street?

"A. No.

"Q. Did you ever learn that David Heggy lived there?

"A. No."

Testimony of David Heggy, February 1, 1984, at pages 158 and 159.

"Q. I'll refer, sir, to Exhibit #1 which was sent to David Heggy Post Office Box 938, Beloit, Wisconsin, did you at one time have that post office box?

"A. Yes.

"Q. And when did you discontinue that?

"A. Maybe April, May of '83. That's a rough—

"Q. Why did you discontinue that?

"A. Well, I had a little squabble with the post office department and also it was costing $600 for every 10 years and I found it more convenient and cheaper way to do it.

"Q. Now, that Exhibit #1 was returned marked Route 1, Box 250, Denture Lane, Beloit, Wisconsin. Did you ever use that post office box?

"A. Box 250 I'm not familiar with. Never used it.

"Q. That exhibit was marked return to sender, not deliverable as addressed. No forwarding order on

file. Why did you not have a forwarding order on file with the post office, Mr. Heggy?

"A. Because Suzanne Hall had had some, oh, with her parents she had some disagreements and she was in a mood to break the connection with them and so we when she took care of that she didn't make a forwarding address and it was also another way to terminate the junk mail we have been receiving.

"Q. Well, specifically what was the reason that you did not leave a forwarding address, Mr. Heggy?

"A. Suzanne Hall took care of it and that was agreeable that she not leave a forwarding address. I just merely notified who needed to know.

"Q. Well, I understand why she changed it and left no forwarding address. But was there any specific reason why you did not leave a forwarding address?

"A. Get rid of the junk mail. You get on a list and you get junk forever. This is a way to get a fresh start with the junk mail."